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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/599,311	09/25/2006	Alain Bernard Daouse	3712036.00754	6771
29157	7590	05/25/2010	EXAMINER	
K&L Gates LLP			ANDERSON, JERRY W	
P.O. Box 1135			ART UNIT	
CHICAGO, IL 60690			PAPER NUMBER	
			1781	
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/599,311	<b>Applicant(s)</b> DAOUSE ET AL.	
	<b>Examiner</b> JERRY W. ANDERSON	<b>Art Unit</b> 1781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 19 February 2010.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 24, 26-30 and 44 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 24, 26-30 and 44 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)                        | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

Examiner acknowledges the receipt of the Applicant's Amendment, mailed 2/19/2010. Claim 25 is cancelled; claims 24 & 44 are amended and claims 24, 26-30 & 44 are pending.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**Claims 24, 26-30 and 44 rejected under 35 U.S.C. 103(a) as being unpatentable over Carter, P.H., et al., (3,171,367) in view of Covert, C.J., et al., (2,670,696) and further in view of Ohlin, E.L. (3,552,212)**

Regarding claims 24 and 44, Carter discloses the claimed invention, including, the preparation of a chocolate lined ice cream cone, by spraying the interior of the cone

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with chocolate, and filling the interior of the cone with ice cream, which hardens the chocolate layer, (lines 44-60, col.3, '367) but lacks removing excess chocolate, recycling chocolate, and removing particulates from the nozzle.

Covert discloses chilled molds are filled [with chocolate] by depositing machine, (lines 40-55, col.1, '696) allowing a solid layer of chocolate to form and removing the excess chocolate by suction, (lines 10-13, 50-55, col.1, '696) nozzle may enter mold substantially to the bottom of the mold cavity, (lines 6-10, col.2, '696) the suction is on when the nozzle meets the surface of the liquid in the mold cavity. (lines 1-5, col.2, '696) The chocolate removed by suction to the tempering kettle which supplies the depositing machine, (lines 25-30, col.2, '696) but lacks removing particulates from the nozzle

Ohlin ('212) discloses: a device for cleaning the exterior of an elongated body and removing loosely adhering matter, (lines 27-29, col. 1, '212) droplets of the sample may remain on the inner and outer surface of the pipette, (lines 50-52, col.1, '212) with a collar with a bore slightly larger in diameter than tube is positioned so that the portion of the tube is cleaned as it passes through bore, (abst. '212) tubular probe which is mounted for movement up and down out of and into successive sample containers for withdrawal of the samples therein. (lines 43-45, col. '212) Suction is applied to the annular space between the walls of the bore and the take-off tube to cause air or a wash-liquid to flow around the take-off tube and entrain any loosely adhering sample deposits on the outer surface of the take-off tube. (abst, '212)

Carter is involved in the preparation of a chocolate lining in an ice cream cone, by spraying the interior of the cone with chocolate, and is seeking to solve the problem

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of protecting the cone material from becoming soggy by the subsequent addition of ice cream.

Covert is involved in the preparation of chocolate shells by pouring chocolate into a chilled mold, allowing the chocolate to form a solid layer next to the mold surface and removing the excess chocolate by use of suction.

Ohlin is using suction to collect a sample, and is seeking to solve the problem of material adhering to the outside of the pipette, by using suction to cause an a gaseous flow, air, to flow across, around and along the pipette tip, removing any adhering material, while the inside of the pipette is cleaned by a liquid and/or a gaseous flow created by suction.

Carter and Covert are seeking to solve the same problem, the formation of thin layers of chocolate, and Covert is removing the excess chocolate from a mold using a suction nozzle,

Ohlin is concerned with a problem concerning the removal of loosely adhering material and the cleaning the exterior of a probe that going from one container to another.

The applicant is blowing air or a gas into the pipette tip to dislodge particulate matter and to carry said particulate matter in the same direction as the previously aspirated chocolate.

Lab technicians routinely use blowing and/or suction creating a gaseous flow to clear adhering matter, whether particulate or liquid, from the interior and the exterior of a pipette.

It would have been obvious to one of ordinary skill in the art at the time of the invention to have modified the chocolate coated ice cream cone machine of Carter, to incorporate the use of excess chocolate and the suction removal of the excess chocolate of Covert, and the cleaning of the pipette of Ohlin, in order to make a chocolate coated ice cream cone that does not turn soggy with the addition of ice cream, and result in a action may be relatively rapid and continuous, with high rate of production, and a uniform, high grade product, (lines 13-15, col.3, '696) Although Covert does not explicitly state that the chocolate recovered from the molds by the nozzle is recycled, he does state that it goes to the tempering kettle and thence to the depositing machines. (lines 28-30, col.2, '696) It would be obvious to one of ordinary skill in the art that the chocolate recovered in Covert was being recycled for further use.

One of ordinary skill in the art would find it obvious that the nozzle having suction applied and the exterior gaseous air flow (due to suction) of Ohlin would serve the same purpose in a similar manner as the instant application.

Suction and blowing are alternate embodiments that result in similar effects, namely, both processes would result in the movement of material, and a gaseous flow passing through the pipette, either expelling the adhering material or withdrawing the material into the pipette for further disposal would produce the same result and such would have been obvious to the practitioner.

One of ordinary skill in the art would have found it obvious that the modification of the chocolate removal nozzle of Covert with the pipette cleaning collar of Ohlin, would have the suction through the nozzle causing a gaseous flow from the nozzle to the

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chocolate tempering kettle, and the gaseous (air) flow across, around and along the nozzle due to the suction going to line 29 of the collar of Ohlin, would result in any matter being dislodged from the exterior of the nozzle, being entrained in the gaseous (air) flow going into the nozzle, and the matter would then be carried into the pipette and in the same direction as the chocolate previously aspirated.

Regarding claim 26, Carter, Covert, and Ohlin disclose the claimed invention, as discussed above, including that the nozzle of Ohlin fits snugly in a sleeve, (Fig. 2 & 3, '212) such that any particulate matter that adheres to the nozzle will be removed during the retraction into the body.

Regarding claim 27, Carter, Covert, and Ohlin disclose the claimed invention, as discussed above, including the nozzle of Ohlin has an opening in the bottom of the nozzle, and the nozzle is retracted into a chamber with an inlet for the admission of gaseous or liquid purges. (Fig.2 & 3, '212)

Regarding claim 28, Carter, Covert, and Ohlin disclose the claimed invention, as discussed above, including the container is a conventional ice cream cone, (line 31, col. 1, '367)

Regarding claim 29, Carter, Covert, and Ohlin disclose the claimed invention, as discussed above, including the coating is chocolate. (lines 37-38, col.4, '367)

Regarding claim 30, Carter, Covert, and Ohlin disclose the claimed invention, as discussed above, including the food product is ice cream. (lines 41-43, col.1, '367)

***Response to Amendment***

The applicant having cancelled claim 25, the 35 USC § 103 rejection thereunto is withdrawn.

The applicant having amended claims 24 and 44, the 35 USC § 112 2nd rejections thereunto is withdrawn

***Response to Arguments***

Applicant's arguments, see ¶ 3, pg 8, remarks to ¶ 4, pg 10, filed 2/19/2010, with respect to the § 112 2<sup>nd</sup> rejection of claims 24 and 44, having been fully considered in light of the amendments of claims 24 and 44, also filed 2/19/2010, are persuasive. The 35 USC § 112 2<sup>nd</sup> rejection of claims 24 and 44 has been withdrawn.

Applicant's arguments filed 2/19/2010 have been fully considered but they are not persuasive.

Examiner has expanded upon the rationale for the combination of the prior art, see above, and submits the prior art does disclose the elements of claims 24 and 44.

The applicant states that the cone would soften, if the cone was completely filled with chocolate. (¶ 1, pg 12, Applicant's remarks) Covert teaches that the molds are chilled so that the chocolate congeals on the surface of the mold, which presumably would be the case of the cones filled by Carter. Further, Carter teaches that previously to his method of spraying and immediately filling with cold ice cream to solidify the chocolate, that cones are completely immersed in chocolate to create a chocolate coating of the inside and outside of the cone, and that the hardening of the chocolate layer took some time, and rendered the cones less crispy. (lines 36-52, col.1, '367)

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Note that this was not an immediate process but took some time. However, the removal of chocolate under Covert done in an automated process, and the time the chocolate resides in the chilled mold, although not stated, is described as relatively rapid and continuous. (lines 13-14, col. 3, '696)

The applicant points to Carter stating that a large quantity of chocolate was not necessary, (¶ 2, pg 13, applicant's remarks) and concludes that there would be no reason to combine Carter and Covert. However, examiner submits that Carter is referring to the prior art's coating of both the outside and inside of the cone. (lines 7-17, col.2, '367) The next statement which contains the quoted statement begins "further saving" and thus is further comparing Carter's improvements to the prior art.

Further, Carter is stating that since the time between the application of the chocolate and the addition of the ice cream is minimal, this prevents excessive adsorption of the chocolate by the cone material.

As to the motivation to combine, examiner directs the applicant to the expanded rationale above.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, THIS ACTION IS MADE FINAL. See MPEP

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§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JERRY W. ANDERSON whose telephone number is (571)270-3734. The examiner can normally be reached on 7 am to 5 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/C. SAYALA/

Primary Examiner, Art Unit 1781

Jwa